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INTERACTIVE PRE-CLEARANCE DEVELOPMENT

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Congress spent relatively little time in 1965 discussing the "special provisions" in the Voting Rights Act ("VRA"), the federal law responsible for America's "Second Reconstruction."[1] Enacted to enforce the constitutional rights to racial equality guaranteed by the Fifteenth Amendment, the VRA dealt a final blow to the segregationist program of denying black voters access to the ballot in the South.[2] The law is often credited for prompting the emergence of minority political participation and representation both in the South and throughout the country.[3]

The most significant of these special provisions is contained in Section Five of the VRA, which mandates that certain state and local governments seek and obtain federal permission or "pre-clearance" before changing their election rules and practices.[4] The provision radically shifts the traditional balance

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1. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified in scattered sections of 42 U.S.C. §§ 1973 to 1973bb-1 (2006)); J. MORGAN KOUSSER, *The Voting Rights Act and Two Reconstructions in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 135, 135 (Bernard Grofman & Chandler Davidson eds. 1992).

2. *See generally* VLADIMIR ORLANDO KEY, SOUTHERN POLITICS IN STATE AND NATION (University of Tennessee Press 1984) (1949); STEVE LAWSON, RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941 56 (Temple University Press 1991).

3. *See generally* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965 – 1990 (Chandler Davidson & Bernard Groffman, eds., Princeton University Press 1994) (offering an empirical assessment of state level political advancement for minority communities as a result of the VRA's adoption and enforcement).

4. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (1965); *see also* U.S. CONST. amend. XV (prohibiting states from "deny[ing] or abridg[ing] the right of any citizen of the United States to vote on account of race or color"). I describe the pre-clearance remedy at greater length in later sections, but it is helpful to speak with some level of precision at this stage. The term "pre-clearance" refers to the special remedy in the Voting Rights Act that "freezes" existing voting laws in certain state or local jurisdictions with especially unfavorable records of race discrimination in the electoral arena. In order to make changes to existing law, the jurisdiction must receive permission from the Justice Department or the U.S. District Court in Washington D.C. In either case, the state must show that its proposed change does not have the

between state and federal power, yet this issue appeared only infrequently in the congressional hearings and floor debates on the VRA.[5] Public frustration over the violence against civil rights marchers and the state evasion of federal court orders by the states prompted outcries for swift passage of a tough, effective voting rights bill.[6] Amidst such a widespread call for strong federal action, questions about the bill's impact on federalism and state sovereignty were quickly lost.[7]

From its relatively unassuming origins, the pre-clearance provision today has emerged as an important – and controversial – part of the VRA. Since 1990, the remedy has been the source of most voting rights litigation in the Supreme Court.[8] In its next term, the Supreme Court will consider the constitutionality of the pre-clearance remedy as the latest episode in its discourse on congressional enforcement authority under the Civil Rights Amendments.[9]

As the most recent renewal hearings in 2006 show, many view this development as an unfavorable one.[10] They bemoan the remedy's transformation from a supporting part of the original enactment into an all-purpose tool of federal enforcement today.[11] According to their account, the

purpose and will not have the effect of denying or diluting the right to vote on account of race or color.

5. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

6. *See, e.g.*, United States v. Alabama, 171 F. Supp. 720 (M.D. Ala. 1959); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (Harcourt, Brace & World, Inc. 1961) (describing the social and political isolation experienced by a subset of southern federal judges who sided against southern states in civil rights cases).

7. President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965) *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 281–84 (1966).

8. *See* S. REP. NO. 109-295, pt. IIB (2006); H.R. REP. NO. 109-478, at 18, 36–44, 52–53 (2006).

9. Bartlett v. Strickland, 649 S.E.2d 364 (N.C. 2007), *cert. granted* 76 U.S.L.W. 3289 (U.S. Mar. 17, 2008) (No. 07-689); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997); Kimel v. Fla. Bd of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (2000); Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Pamela Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L.REV. 725, 730–31 (1998).

10. *See* Bush v. Vera, 517 U.S. 952 (1996) (rejecting Texas' redistricting plan as an unconstitutional racial gerrymander); Miller v. Johnson, 515 U.S. 900 (1995) (rejecting congressional redistricting predominantly motivated by race in Georgia); Shaw v. Reno, 509 U.S. 630 (1993) (finding that the Constitution generally forbids redistricting that is predominantly driven by race); Nancy K. Bannon, *The Voting Rights Act: Over the Hill at Age 30?*, 22 HUM. RTS. Q. 10 (1995).

11. *See, e.g*, Holder v. Hall, 512 U.S. 874, 893 (1994) (J. Thomas concurring) (noting the "sea change that has occurred in the application and enforcement" of the remedy); ABIGAIL

purpose of pre-clearance was to supplement the litigation remedy outlined in Section Two of the VRA.[12] The more traditional brand of civil rights litigation was supposed to be the "sword" to dismantle ongoing racial discrimination in elections, while the pre-clearance review process served as an administrative "shield" to stop prospective efforts to discriminate.[13] Fashioning pre-clearance as an offensive weapon departs from its initial conception as a narrow, temporary response to election-related race discrimination.[14] Today, pre-clearance now requires states to adopt institutional reforms that unreasonably interfere with party competition and state sovereignty—which greatly exceeds Congress' vision.[15]

That the pre-clearance regime has transformed during its four decades of enforcement can hardly be disputed. But this article claims that the aforementioned "pre-clearance run amok" claim is quite mistaken for two reasons. First, the changes in the pre-clearance system did not happen by chance. In fact, these changes have resulted from the careful and measured choices of two sets of political actors—Congress and the judiciary. As these two groups repeatedly reshaped this remedy in response to new kinds of election problems that emerged, their revisions have significantly redefined the pre-clearance remedy.[16]

A second and more critical flaw of the criticism is its notion that pre-clearance has uniformly expanded over time. The true story of this remedy's development is a far more dynamic and complex tale. As this article will explain, only certain aspects of the pre-clearance regime have broadened in their application during the last forty years.[17] Today, the remedy covers more parts of the country and applies to a larger share of election laws and procedures than it did in 1965. But the key component of this remedy—its standard for reviewing changes in election law—has followed a markedly different path. The central element of the remedy has become decidedly more limited in its application.[18]

In advancing these points, this article relies on observations from the field of political science to help explain why the evolution of pre-clearance has

THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (Harvard University Press 1987).

12. THERNSTROM, *supra* note 11, at 137.

13. *Id.* at 190.

14. *Id.* at 190–91.

15. *See Holder*, 512 U.S. at 892 (J. Thomas concurring) ("[W]e have immersed the federal courts in a hopeless project of weighing questions of political theory—questions judges must confront to establish a benchmark concept of an 'undiluted' vote.").

16. Scott Gluck, *Congressional Reaction to Judicial Construction of Section Five of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 384 (1996).

17. *See* discussion *infra* Part III.

18. *Id.*

followed such a complex path. Put simply, this provision is the product of what may be called an interactive statutory construction – the involvement of both Congress and the courts to provide meaning to the words in the law. The current meaning of the statute results from the roles that both Congress and the courts play in providing meaning to the text. In constructing the remedy, the interaction between the two branches has both clarified and confused key elements of the provision. As a result, parts of the remedy have become more expansive in their application while others have become decidedly less so.

The article proceeds as follows: Part I discusses the political science model of interactive statutory construction used to understand the role judges play in interpreting statutes. Part II lays out the evolution of the various components of the pre-clearance remedy using the interactive model as a guide. Finally, Part III discusses the impact of the interactive development for pre-clearance before briefly concluding that the institutional of the Court helps to explain why one part of the remedy has followed a distinct path over time.

I. POLITICAL SCIENCE AND STATUTORY CONSTRUCTION

One reason that construing statutes poses a conceptual challenge is that multiple institutions contribute to the enterprise.[19] Scholars of political science and law often recognize that a statute's meaning depends on the actions of multiple officials.[20] Most often, Congress begins by selecting the words contained in statutes commanding citizens to do (or not do) certain things. Those words hold meanings, some of which Congress explicitly defines when it drafts and amends the text itself.[21] But the particular meanings that Congress prefers may not take effect without the consent of the President, who may veto proposed meanings that he finds objectionable.[22] Even when both of these actors share a view about what a given enactment means, the consistent

19. RONALD DWORKIN, LAW'S EMPIRE 11–14 (1986); HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994); WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (Amy Guttman ed., 1998); Randal N. Graham, *A Unified Theory of Statutory Interpretation*, 23 Statute L. Rev. 91 (2002).

20. For a critique of the political science approach to interpretation, see Pamela Karlan & Daniel Ortiz, *Negative Political Theory*, 68 S. CAL. L. REV. 1691 (1995).

21. SCALIA, *supra* note 19 at, xii, 3; Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994).

22. U.S. CONST. art. I, § 7, cl. 2 (providing that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States" who may veto the bill). *See generally* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) (arguing that legislators' awareness that the presidential veto has the power to end the legislative process, subject only to their ability to override a presidential veto with a supermajority vote, profoundly influences the legislative process and the dynamics of bargaining and deliberation).

application and interpretation of the statute depends on the work of executive agencies and courts when they confront problems regarding statutory meaning.[23]

In their work on strategic statutory interpretation, Ferejohn and Weingast explore the judicial role in interpreting statutes. They argue that any judge's effort at construction poses "a practical tension between democracy and the rule of law."[24] Because its members typically focus more on re-election than on governance, Congress as an institution does not often ensure that legislation follows a well-ordered, uniform set of rules.[25] This is especially true where a statute undergoes several amendments or reconciliation between both legislative chambers. As a result, the judiciary must make sense of ambiguous (or even contradictory) statutory language to resolve legal disputes when they arise.[26]

For their part, judges select interpretive tools partly based on their own views about legislative power.[27] They may privilege the words of the statute (as textualists might prefer),[28] or they may look beyond the words to find clues about meaning from the enacting legislature (the desire of many intentionalists and some purposivists).[29] Ferejohn and Weingast provide an assessment of these interpretative modes based on their implications for democratic efficacy. Importantly, the authors note that some of the court's choices can actually disrupt the way that Congress manages social policy through deliberative law-making.[30]

To promote greater efficacy in Congress, the authors claim, judicial interpretation ought to acknowledge this key link between the branches. They model interpretation as a kind of sequential interaction—a series of strategic choices to construe a statute in anticipation of (and sometimes in reaction to) the decisions of the other branch.[31] Using the Civil Rights Act's development as an example, the authors show that these institutions can work in concert or

23. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

24. John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L. J. 565, 570 (1992).

25. *Id.*

26. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

27. *See generally* WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETION (2000).

28. Nicholas Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1614–15 (1991).

29. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13, 27–38 (1994); CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001).

30. Ferejohn & Weingast, *supra* note 24 at 567.

31. *Id.*

at cross-purposes. Just as "Congress is not always silent on how its actions should be interpreted" by a potentially hostile judiciary or later Congress, the authors also note that "courts have shaped their decisions in anticipation of adverse reaction . . . from Congress."[32] Because sharply departing from acceptable interpretations risks hasty law-making by Congress and a cost of unpredictability in the law, a the authors find that a strategic court should adopt interpretations that do not disturb the preferences of the legislative majority that enacted the bill.

II. INTERACTIVE PRE-CLEARANCE DEVELOPMENT

This more dynamic approach to understanding statutory development provides a helpful way of understanding the evolutionary experience of the VRA's pre-clearance remedy. As with the Civil Rights Act, Congress and the Supreme Court have refined the application of the pre-clearance remedy since its inception. But their involvement in this particular project has been selective and, at times, has worked at cross-purposes. The discussion below suggests that this relationship has differed for different aspects of the pre-clearance regime.

In place today are expansive conceptions of the remedy's "coverage" and "submission" components, which the branches have mutually reinforced in their statutory interpretations over time. On matters of where and when federal oversight applies, Congress and the Court have entrenched a broad, expansive view of the remedy. There are few exceptions to the general rule that "coverage" applies fully in places that are designated by Section Four of the VRA.

Similarly, there is shared institutional understanding on applying a robust meaning to the requirement that covered jurisdictions submit changes in law related to voting. Judicial and legislative constructions involving this element have reinforced each other, with each often explicitly citing its counterpart's pronouncements to confirm its own reasoning. Consequently, there is great clarity in the statute about which jurisdictions are subject to the pre-clearance requirement and which kinds of new enactments require federal review.

Compared to these two elements of the remedy, the legal standard for authorizing pre-clearance changes has followed a markedly different path. While the provision's geographical scope and subject-matter limitation have been construed in very similar ways, the legal standard of review has become a more contested concept. In its current incarnation, the substantive standard for review now prohibits very few types of discriminatory changes. As the Supreme Court has most recently described it, the standard only bans a state change whose purpose or effect is "retrogressive" in nature. But the definition

32. *Id.*

of retrogression itself provides little guidance about the kind information relevant in this analysis.

In contrast to their cooperative effort to define the other features, Congress and the Court have engaged in a more combative relationship with this part of the remedy. After the initial enactment, Congress did not specifically reaffirm its original view of the pre-clearance standard as it did with the other parts of the remedy. In the absence of an explicit endorsement of its earlier views about the pre-clearance standard, the judiciary was free to develop understandings of its own. Starting in the mid 1970s, the Court began outlining its own conception of how the review standard ought to function. That narrow construction of this provision, which largely supports the judiciary's effort to limit the application of voting rights pre-clearance, largely prevails today.

A. The Scope of Pre-clearance

Two distinct elements in the pre-clearance provision define the scope of this remedy: the places where the pre-clearance remedy applies ("coverage") and the types of local enactments requiring federal review and approval (the "submission" requirement). With respect to legal questions about both of these issues, the Court and Congress have interpreted the statute in an expansive manner to assure that the pre-clearance remedy has broad application.

1. When is a Jurisdiction "Covered"?

Both the legislative and judicial constructions of the pre-clearance remedy have promoted an expansive view about which jurisdictions in the country are covered. Congress has approved several amendments to lengthen the remedy's geographic reach, and the Court has turned back various efforts to reverse this trend. This result is unsurprising, since the statutory text itself says a great deal about which parts of the country the law targets.[33] The triggering formula in Section Four uses objective, voting-related factors to guide this decision. For a state or local entity to be designated for pre-clearance, federal officials must find two things: (1) that a state's laws contain one of a specified list of voting prerequisites and (2) that registration and participation rates in certain

33. *See* 42 U.S.C. § 1973b(a) (2000). As scholars have often noted about the drafting of this provision, the Justice Department and Congress worked very carefully to designate those states where these special obligations would apply. Their purposeful exclusion of politically sensitive states like Texas (home to President Johnson), Tennessee, and Arkansas (both represented by powerful Democratic Senators) from the oversight regime suggests that party politics played some role in developing the provision. Nonetheless, the facially neutral criteria that drove the formula offered an objective basis for enforcing the remedy to the fullest extent. Chandler Davidson *The Voting Rights Act: A Brief History, in* CONTROVERSIES IN MINORITY VOTING 17 (Bernard Grofman & Chandler Davidson eds., 1992).

national elections fall below a threshold percentage of the voting age population.

Soon after the VRA became law, the Supreme Court in *South Carolina v. Katzenbach* endorsed this method of defining the remedy's geographic scope.[34] The majority specifically rejected arguments that Congress had exceeded its authority by infringing on the sovereignty of selected states. Noting the law's goal to "banish the blight of discrimination in voting," the Court found that Section Four reasonably targeted parts of the country where violations occurred most often—which, in 1965, was the Deep South.[35] These states had maintained a record of "intransigence, foot dragging, and sometimes overt hostility" to court orders and litigation, which contributed to low levels of registration and turnout.[36] In light of this evidence, a geographically specific remedy was a reasonable and permissible solution. The approval of both the ends and means of the law marked an important consensus with Congress about limiting the remedy to places where registration and voting problems were most severe.

The Court's favorable view of the triggering formula in turn supported later efforts by Congress to broaden pre-clearance coverage in later amendments. Congress reworked Section Four's framework in 1970 and 1975 by updating the threshold measures of voter participation, based on more current national elections.[37] As a result, these modifications of the trigger brought new areas of the country into the pre-clearance system. The most significant substantive change occurred in 1975, when Congress identified English language-based rules and procedures as pre-requisite devices that could trigger pre-clearance coverage.[38] The targeted jurisdictions captured by this amendment were mostly in the South and Southwest, extending the remedy's geographic reach into new regions with different racial minority groups.[39] With *Katzenbach*'s endorsement of relying upon neutral factors to

34. 383 U.S. 301 (1966).

35. *Id*. at 304.

36. *Id*. at 311–13.

37. *See Voting Rights Act Extension: Hearings Before Subcomm. Number 5 of the H. Comm. on the Judiciary*, 91st Cong., H.R. Rep. No. 91-397, at 3280 (1970); *Joint View of Ten Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965*, 91st Cong. 5517-5520 (1970) [hereinafter *Joint View*]; S. Rep. No. 94-295, at 777 (1975). The Act's coverage provision expanded to parts of New York, Arizona, California, Wyoming, Connecticut, New Hampshire, Maine, and Massachusetts.

38. *Joint View*, supra note 37 at 5517-20. The 1970 statute based coverage on participation during the 1968 elections, while the 1975 extension added a threshold based on state-by-state participation during the 1972 elections.

39. *See* Davidson, *supra* note 33, at 34–37.

guide the "coverage" designation, few in Congress doubted the propriety of refashioning the formula to add to the roster of "covered" jurisdictions.[40]

This is not to say that developing the coverage formula eliminated all possible ambiguities. Several cases before the Court tested the extent to which coverage should apply to a targeted jurisdiction in special circumstances. But even when it was invited to curtail the provision's scope, the Court has largely followed Congress' lead in promoting a broad approach to pre-clearance coverage. An examination of two categories of cases—those involving the application of the provision to political subdivisions and those applying coverage to political parties—illustrate this point well.

In *United States v. Sheffield*, the Court made clear that "all entities having power over any aspect of the electoral process" in a covered state were subject to the pre-clearance review system.[41] The defendant jurisdiction in this case was a city that adopted an at-large system for local elections through a referendum.[42] Though it did not oppose the referendum, the DOJ lodged pre-clearance objections to specific elements of the proposed election change.[43] A U.S. District Court dismissed a lawsuit to enforce the federal objection, holding that Sheffield was not a "covered" jurisdiction in terms of the VRA.[44] That legal conclusion turned on a reading of language in Section 14(c) of the VRA, which arguably limited pre-clearance coverage to those subdivisions and local entities that controlled voter registration.[45]

On review, Justice Brennan rejected this construction and found that the Section 14(c) distinction was "completely irrelevant to the Act's purposes."[46] The lower court's "crippling" interpretation made little sense in light of Congress' broad statutory objectives.[47] The Court's reasoning centered instead on Section Four, whose terms are referenced in Section Five.[48] Section Four imposed its duties on States as entire territories, "not just [on those] county governments or units of local government that register voters."[49] Nothing in the triggering provision suggested that coverage depended upon a jurisdiction's control over the registration process. Therefore, the best way of reading Section Five, which borrows from Section Four, was that it enjoyed the same reach.[50] The competing construction, the Court continued, would have created

40. *Joint View*, supra note 37 at 5517-20.
41. 435 U.S. 110 (1978).
42. *Id.* at 114.
43. *Id.* at 114–15.
44. *Id.* at 117–18.
45. *Id.*
46. *Id.*
47. *Sheffield*, 435 U.S. at 130.
48. *Id*. at 120.
49. *Id*.
50. *Id*. at 123.

incentives for states to evade federal review and that approach would run counter to the entire pre-clearance system.[51] If the lower court was correct, then local governments would be free to adopt the very same discriminatory rules that Alabama's legislature clearly could not.[52] Finally, the Court made clear that this interpretation was warranted since Congress had effectively ratified this view by extending the remedy on two occasions following the decision in *Katzenbach*.[53]

The Court interpreted coverage expansively in the context of pre-clearance "bailout" as well.[54] *City of Rome v. United States* is perhaps better known for upholding the constitutionality of the 1975 amendments to Section Five, but the Court's discussion about the scope of Section Four is noteworthy for present purposes.[55] The specific issue was whether a city located within a covered state could independently excuse itself from pre-clearance.[56] Noting that *Sheffield* did not establish that a city was the same as a "state" for pre-clearance purposes, the majority found evidence in the 1975 legislative hearings on the VRA showing that bailout was conceived as an all-or-nothing proposition.[57] During these sessions, both the House and Senate made clear that localities could not pursue bailout on their own.[58] In light of these statements, the Court found no merit to the city's plea for relief. So long as the state remained covered by the pre-clearance regime, its subsidiary units did as well.[59]

Aside from extending coverage to state and local governments, the Court has found private entities subject to the remedy in their administration of elections. *Morse v. Republican Party of Virginia* recognized that parties can

51. *Id*. at 124–25.

52. *Id*.

53. *Sheffield*, 435 U.S. at 135 ("Here, the 'slumbering army' of Congress was twice 'aroused,' and on each occasion it re-enacted the Voting Rights Act and manifested its view that § 5 covers all cities in designated jurisdictions") (footnote omitted).

54. "Bailout" refers to a procedure allowing a covered jurisdiction to avoid pre-clearance by bringing a declaratory judgment action in the U.S. District Court for the District of Columbia and proving that it has not engaged in discrimination for a designated length of time. *See* 42 U.S.C. § 1973b(b).

55. 446 U.S. 156, 167–68 (1980).

56. *See* S. Rep. No. 417 at 57, 44. This decision was effectively mooted by Congress' pre-clearance extensions in 1982, but the change was reflective of a new policy rather than a rejection of the Court's misinterpretation. In any event, the case is important in that it offers evidence of the Court's adherence to a broad approach to interpreting the coverage component of pre-clearance.

57. *City of Rome*, 446 U.S. at 167–68; *see Sheffield*, 435 U.S. at 128 ("Because the designated jurisdiction in this case is a State, we need not consider the question of how § 5 applies when a political subdivision is the designated entity").

58. *City of Rome*, 446 U.S. at 169.

59. *Id.* at 191–92.

wield power in ways that raise pre-clearance concerns.[60] The party in that case charged a special fee for all delegates in its nominating conventions, which substituted for primary elections.[61] In explaining why the party fell within the scope of the Act, the Court referred to an historical analogue—the infamous "White Primary" cases.[62] The principle from those cases is that political regulation is core a state function that is subject to Constitutional commands, whether the state itself or its agents issue the rules.[63] Since this event was the crucial step in choosing officials, for example, *Smith v. Allwright* held that blacks could not be excluded from the Texas Democratic primary.[64] Virginia similarly gave certain preferences in its general elections to nominees from the party conventions.[65] Whether or not the advantage was significant, the delegation of power closely resembled the kind of evasive maneuvering that pre-clearance sought to remedy. Significantly, the Court found legislative comments suggesting that coverage was appropriate in this very same context.[66] Congress appeared to understand the linkage between parties and elections by drafting Section 14 of the Act, which defined "voting" to include the "selection of party officers."[67]

2. What Changes Are Reviewable?

Just as Congress and the Court have construed the geographical reach of pre-clearance expansively, they have also required states to submit a broad set of proposed laws for federal review. Compared to the triggering formula in the statute, the applicable text is not as clear about what types of law must be submitted. Section Five states that new "standard[s], practice[s], or procedure[s] with respect to voting" are reviewable. As this language has been construed by Congress and the Court, the submission requirement applies to an especially large number of state enactments. Very few limitations to this rather broad conception of the remedy's subject matter have been recognized. On the whole, then, there has been very little question that the federal oversight system applies to several categories of state enactments.

60. Morse v. Republican Party of Virginia, 517 U.S. 186, 205 (1996).

61. *Id*. at 190.

62. *Id*. at 199 ("In concluding that the regulation applies to the Party, we are guided by the reasoning of *Smith v. Allwright*,, decided more than half a century ago."); *see also* Terry v. Adams, 345 U.S. 461 (1953) (holding that the Texas Jaybird party was subject to the Fifteenth Amendment); Smith v. Allwright, 321 U.S. 649 (1944) (outlawing the racially selective white primary); Nixon v. Herndon, 273 U.S. 536 (1927) (invalidating a Texas statute that denied blacks the ability to participate in Democratic primaries).

63. *Smith*, 321 U.S. at 664–65.

64. *Id.* at 666.

65. *Morse*, 517 U.S. at 186–87.

66. *Id.* at 188.

67. *Id.* at 203–04.

The broad judicial conception of the submission requirement was apparent in the first Supreme Court case describing the types of changes subject to federal review in the VRA.[68] The plaintiffs in *Allen v. State Board of Elections* challenged several rules that states had enacted without federal review.[69] While all related to political participation, only one of these rules directly affected registration and balloting. Nevertheless, the Court required review in each instance because the pre-clearance remedy enjoyed "the widest possible scope" in its application.[70] The Court explained its position based upon the reasoning from *Katzenbach*:

> We must reject the narrow construction . . . to Section Five. The Voting Rights Act was aimed at subtle, as well as obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, . . . the Act gives a broad interpretation of the right to vote, recognizing that voting includes "all action necessary to make a vote effective.[71]

State laws bearing even the potential to do harm to the franchise even "in a minor way" were reviewable "changes" in the pre-clearance regime.[72] By defining the franchise quite broadly, the Court established that a large number of state laws would be closely regulated pursuant to the submission requirement.

Congress ratified this judicial construction by extending Section Five of the VRA in 1970.[73] Due to pre-clearance enforcement, registration and turnout rates all had significantly improved voter participation in the originally covered states.[74] However, advocates of a statutory extension concluded that these states needed more progress. In particular, Congress noted that vote dilution continued to limit the effectiveness of votes that were actually cast.[75] Dilution did not prevent a citizen from registering or casting a ballot, but it minimized the impact of that vote on electoral outcomes.[76] Legislators relied upon the broad conception of the pre-clearance remedy in *Allen* as authority for modifying Section Five to address these more subtle and sophisticated manipulations of the electoral system.[77]

68. Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969).
69. *Id*. at 550.
70. *Id*. at 566–67.
71. *Id*. at 565.
72. *Id*. at 566.
73. Voting Rights Act of 1970, Pub. L. No. 91-284, 84 Stat. 314 (1970).
74. *Joint View*, *supra* note 37, at 5520.
75. *See id*. at 5520–21.
76. *See id*. at 5520.
77. *Id*. 5521.

The Court's endorsement of the 1970 amendment was apparent in two particular decisions—*Perkins v. Matthews* and *Georgia v. United States*.[78] In both, the legislative hearings provided support for extending federal review to changes with the potential to dilute the right to vote. In *Perkins*, for instance, the shift in focus led the Court to find that an annexation proposal in Mississippi was subject to federal review.[79] The majority in that case explained that a racially selective policy could abridge the franchise in two ways. First, local officials could decide to annex only those outlying communities where whites lived.[80] Second, a racially selective annexation would mean that votes in black communities already in the jurisdiction might be diluted.[81] Thus, the Court acknowledged the probability of vote dilution along with that of outright denial as circumstances that create a pre-clearance violation.[82]

Likewise, in *Georgia*, the Court invoked this rationale in rejecting a proposal to redraw election districts.[83] Georgia had not submitted a new election district plan to federal authorities, and the state sought review on whether a pre-clearance submission was even necessary for redistricting.[84] Turning again to the 1970 legislative record, the Court found that district drawing was one of the "standards, practices, or procedures with respect to voting" included in Section Five.[85] Redistricting could dilute votes by shifting district lines to "pack" minority voters into a single district or to "crack" large concentrations of these voters.[86] Significant in this analysis was the observation that none of the legislative changes conflicted with the view taken in *Allen* that all policies with the potential to affect the right to vote are reviewable.[87] This point was further confirmed by the reliance upon the *Allen* decision by legislators who sponsored the 1970 extension: "We can only conclude then that *Allen* correctly interpreted the congressional design when it held that "the Act gives a broad interpretation of the right to vote, recognizing

78. Georgia v. United States, 411 U.S. 526 (1973); Perkins v. Matthews, 400 U.S. 379 (1971).

79. *Perkins*, 400 U.S. at 390–92.

80. *Id*. at 388.

81. *Id.*

82. *Id*. at 388–89.

83. *Georgia*, , 411 U.S. at 532–34.

84. *Id*. at 527–28.

85. *Id*. at 532.

86. Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1041 (2005).

87. *Georgia*, 411 U.S. at 534 ("In the present posture of this case, the question is not whether the redistricting of the Georgia House, including extensive shifts from single-member to multimember districts, in fact had a racially discriminatory purpose or effect. The question, rather, is whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5. It is beyond doubt that such a potential exists.").

that voting includes 'all action necessary to make a vote effective.'"[88] Applying pre-clearance review in this context was perhaps a stretch, but the legislative endorsement provided the justification. Congress recognized that state compliance with the one person-one vote principle would require a regular pre-clearance submission of redistricting plans.

McDaniel v. Sanchez found review appropriate for an election plan adopted in federal court that embodied the "policy choices of [its] elected representatives."[89] In doing so, the Court refused to create an exception to the submission requirement where a federal court orders a "change."[90] The local jurisdiction had altered its election system to resolve a one-person-one-vote violation noted in a federal court's findings.[91] The remedy ultimately was part of the court's final order, but the details of the plan were developed and approved by local officials.[92] Over the objections of the plaintiffs in the case, the judge enacted the plan without pre-clearance review.[93] The jurisdiction characterized the change as a federal court plan, which was not subject to the submission requirement.[94] But, the Court rejected this claim, finding that a "covered' jurisdiction was actually responsible for the new plan.[95] Even though the court may have limited its options, the county was responsible for the plan's details. Additionally, the Court found evidence in the 1975 legislative record weighing in favor of requiring review. The congressional committee that drafted the extension expected that federal oversight would apply in one-person-one-vote cases like these.[96]

In other cases, the Court pushed the bounds of the submission requirement even farther. The "change" in *Dougherty County v. White* was an administrative rule denying pay to state employees who ran for public office.[97] The Court stated that this rule was a "standard, practice, or procedure" because of the context in which this rule was adopted and because of its potential effects on voting.[98] The rule was implemented shortly after a black employee had announced his candidacy for the state legislature.[99] The odd timing cast some doubt on the asserted reason for the rule—maintaining the sound management of public funds. Since the rule targeted only employees engaged

88. *Id.* at 533.
89. 452 U.S. 130 (1981).
90. *Id*. at 148–49.
91. *Id.* at 133–34.
92. *Id*. at 134–35.
93. *Id*. at 135.
94. *Id.* at 138.
95. *McDaniel*, 452 U.S. at 153.
96. *Id*. at 148, n.26 (citing S. REP. NO. 94-295, at 17–18 (1975)).
97. Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32, 34 (1978).
98. *Id*. at 42–43.
99. *Id.* at 34.

in election activity, the intent to change the voting system was simple for the Court to see.[100] In addition, the Court identified two specific ways that withholding salary in these circumstances could adversely affect minority voters. First, the rule created an economic disincentive against candidates pursuing public office.[101] Similarly, with fewer candidates on the ballot, the rule would narrow the choices available to the electorate.[102] Its likely effects, similar to the changes considered in *Allen*, were sufficiently related to the franchise for review.[103] The Court's expansive construction seemed to apply federal review even to more typical administrative rules.

In *McCain v. Lybrand*, the Court held that the submission requirement was not open to exceptions based on administrative expediency.[104] South Carolina advanced a rather novel claim that the Attorney General had "implicitly" approved several laws passed in 1966.[105] These voting-related enactments were enforced without a formal federal review, but the state argued the changes were part of a later filing that the DOJ had approved.[106] The Court did not accept this excuse and enjoined the 1966 laws.[107] Of course, there were practical reasons to have taken the opposite position. In all likelihood, the DOJ was aware of the 1966 laws when it reviewed the "omnibus" submission. Additionally, showing lenience in this case might have avoided the administrative problem of parsing out the elements of South Carolina's election system that remained valid. But the Court once again opted for the more robust version of the submission requirement.[108] The law required that each "change" undergo an analysis of its purpose and possible effects prior to its implementation. Ignoring this omission would have interfered with the entire pre-clearance system.[109] To be effective, the remedy depended upon full state compliance. While the text of the statute did not clearly provide an answer, the Court read the Act to counsel against easing submission burdens on covered jurisdictions.[110]

Not until *Presley v. Etowah County* did the Court present a categorical limitation on the "changes" subject to federal review.[111] There, the Court held that matters involving governance were beyond the types of vote-related rules

100. *Id.* at 40.
101. *Id.*
102. *Id.*
103. *Dougherty County*, 439 U.S. at 43.
104. McCain v. Lybrand, 465 U.S. 236, 246–47 (1984).
105. Brief of Appellee at 33–35, McCain v. Lybrand, No. 82-282 (Sept. 8, 1983).
106. *Id.* at 16–17.
107. *McCain*, 465 U.S. at 239.
108. *Id.* at 249.
109. *Id.*
110. *Id.* at 257.
111. Presley v. Etowah County Comm'n, 502 U.S. 491, 503 (1992).

that are subject to federal review.[112] One of the county governments in this case had settled a Section Two dilution lawsuit by adopting a single-member plan with a majority-black district.[113] Voters from that district chose a black candidate in the resulting elections, but the incumbent commissioners undermined his authority by stripping these offices of independent power.[114] Each member traditionally could decide budget and policy matters in his home district. But the new rule made these choices subject to a majority vote requirement, effectively isolating the lone black member.[115] Even though the design of the new system bore suspicious timing and effects, the Court found that review was not required for this decision because it concerned "governance" as opposed to voting.[116]

The logic in *Dougherty County* seemed to suggest that this reshuffling of political power was a reviewable "change." For one thing, the procedure posed significant problems for minority candidates and their constituencies. Voters expected their representative to enjoy certain independent powers that were suddenly modified after the election.[117] The racially charged atmosphere that led to the lawsuit and settlement made consensus building particularly unlikely. In addition, the context around the Commission's sudden decision to alter its structure seemed equally peculiar. Like *Dougherty County*, the facts in *Etowah County* indicated that race may have played a role in the sudden policy shift. But, the Court found that pre-clearance did not apply because the vote did not "bear a direct relation to voting itself."[118]

Presley appears to cut against the otherwise expansive trend in this area, since the majority enumerates measures that are subject to the submission requirement. Prior to this point, the Court had been reluctant to describe any such limits to avoid giving states latitude to evade the law. Under this rule, though, no proposed law is subject to review unless it has a direct connection to voting or to elections.[119] One could read this opinion as the beginning of a judicial effort to narrow the submission rule from the seemingly boundless version in *Allen*. Congress had not specifically addressed this provision since 1970, so the Court could have imposed its own interpretation. On the other hand, the majority emphasized that its holding only summarized the rule had

112. *Id*. at 506.

113. *Id*. at 522, n.23 (Stevens, J., dissenting).

114. *Id*. at 496–97.

115. *Id*.

116. *Presley*, 502 U.S. at 507. The changes were made "less than nine months after the county's first black commissioner took office, were an obvious response to the redistricting of the county that produced a majority black district from which a black commissioner was elected." *Id*. at 521–22 (Stevens, J., dissenting).

117. *See id*. at 503–04 (majority opinion).

118. *Id.* at 510.

119. *Id.*

been applied in the past.[120] To the extent that the majority meant what it said, *Presley* did not purport to disturb the main point of *Allen*—that pre-clearance deserved an application of the widest scope.

B. The Legal Standard for Pre-clearance Review

As opposed to questions about where and when pre-clearance applies, questions about the review standard have been subject to a much more contested interpretive history. The substantive heart of the remedy is its test for examining state voting changes. According to the statute, a violation exists if the proposed change in law "has . . . the purpose [or] the effect of denying or abridging the right to vote on account of race or color."[121] The standard clearly calls attention to the jurisdiction's intent along with its potential effects on minority voters, and importantly, the standard places the burden of proof on the covered jurisdiction.[122] Thus, a proposed change is invalid and unenforceable in a covered state without affirmative evidence that its purpose and effect does not "deny or abridge" the right to vote.

But, the statutory language is only as effective as its interpretation. The evolution of this feature has been almost exclusively controlled by the judiciary. Until the most recent renewal efforts, Congress has rarely acted to announce its preferred view of this part of the remedy. In the absence of clear legislative efforts, the Court has introduced novel concepts that severely limit federal review to a single issue—retrogression. As a result, the meaning of the pre-clearance standard has become relatively less clear and less predictable than the other parts of the remedy.

1. Retrogression as a Concept

The way the Court has interpreted the standard for reviewing proposals is most evident in *Beer v. United States*, a 1976 decision upholding election districts in New Orleans.[123] Focusing on the plan's likely effects, the Court reversed a trial finding that the proposed map violated the pre-clearance standard.[124] As the Court redefined the test, pre-clearance did not prohibit a new proposal unless its effects were "retrogressive"—i.e., they reduced a

120. *Id.* at 501 ("We agree that all changes in voting must be pre-cleared and with *Allen*'s holding that the scope of Section Five is expansive within the sphere of its operation.").

121. 42 U.S.C. § 1973(c) (2000).

122. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966). According to the Court, Congress intended to shift the advantages of time away from the offending states and to the federal government in these proceedings. *Id.*

123. Beer v. United States, 425 U.S. 130, 142 (1976). There, black residents were about half of the city's population in 1970, but local officials crafted only one single member district with a population approaching a majority of voting age blacks. *Id.* at 134–35.

124. *Id.* at 136, 142.

minority group's pre-existing level of voting strength.[125] Even though the one redrawn district with a sizable black population was less than a majority, the change was deemed "ameliorative" in the sense that blacks were marginally better off than before the change.[126]

This construction seriously limited the remedy's reach, especially in places where racial discrimination was most severe. Pre-clearance would do very little work where black political representation was most depressed. In New Orleans, for example, local officials satisfied the standard by adopting a minimal increase in representation.[127] While it might have been an easy rule for courts to apply in practice, the rule of retrogression was a less robust protection than even the Justice Department had anticipated.[128] Furthermore, this analysis suggested by the Supreme Court ignored contextual evidence of existing race discrimination. Retrogression effectively reduced the review to a quasi-quantitative assessment of the political strength of minorities.

For all its faults, the advantage of *Beer* was in its predictability. However, the Court established several exceptions to this rule in later cases. The justices recognized an "ex necessitate" exception for local annexations.[129] In *City of Richmond v. United States*, the Court approved an annexation that tipped a city's racial balance in favor of white voters.[130] Proof of retrogressive effects was undeniable using *Beer*, since the black percentage of the population would significantly diminish.[131] Yet the annexation plan was deemed permissible, despite these effects, because it "fairly reflected" black political power.[132]

So what was the legislative response to this somewhat novel reformulation of the pre-clearance standard? Evidence from the legislative record developed in 1982 suggests that the reaction was not mere acquiescence.[133] Indeed, the lack of a more concerted response is largely explained by timing. The Court announced its decision in *Beer* just one year after the 1975 legislative amendments to the VRA, which mainly left the administrative standard of review unchanged. Likewise, the Court's refinement of the review standard in

125. *Id*. at 141. Compared to the earlier district map which had carefully avoided black majorities, the proposed plan under review slightly increased the percentage of blacks in one district. *Id.* at 141–42.

126. *Id*. at 141.

127. *See id*. at 150–52, n.7 (Marshall, J., dissenting).

128. Drew Days, *Section 5 Enforcement and the Department of Justice, in* CONTROVERSIES IN MINORITY VOTING (Chandler Davidson & Bernard Grofman eds., 1992).

129. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 330 (2000).

130. City of Richmond Heights v. United States, 422 U.S. 358, 371–72 (1975).

131. *See id*. at 363 (noting that the percentage of blacks would decline from 52% to 42%).

132. *Id*. at 371.

133. *See infra* Part II.B.2.

City of Richmond did not lead to a specific response from Congress.[134] Each of the Court's decisions in this area came on the heels of a legislative revision of the pre-clearance provisions, which primarily focused on expanding the remedy in other ways. In addition, the renewals included sunset provisions intended in part to settle matters for a prescribed period of time. With so much effort to craft a renewal, there was little interest in revisiting the matter to address the Court's view of the standard—even one that seemed in conflict with other parts of the Act.

2. The Short-Lived Notion of Incorporation

But Congress did have an opportunity to react to the retrogression principle in 1982. The catalyzing event for the legislative action was a Supreme Court case holding that Section Two of the VRA only outlawed intentional discrimination[135]—a position that many believe was inconsistent with the original intent of the 1965 statute.[136] Sponsors in Congress therefore pushed for specific changes in the statutory text to make clear that either a discriminatory purpose or a disparate effect would violate the law in most cases.[137] Even though most of the legislative proceedings focused on the language and application of Section Two's application in vote dilution cases, there is significant evidence in the record showing that legislators believed that these modifications would at least indirectly encourage a less restrictive understanding of the pre-clearance standard.[138]

During the hearings on the amendments, committee reports adopted in both chambers endorsed the idea that a pre-clearance objection was appropriate anytime a proposed change in law violated the Constitution or Section Two of the Voting Rights Act.[139] This conception of the remedy imposes a more exacting standard of the review standard than *Beer* suggests, since it adds an additional level of analysis. Even some non-retrogressive proposals might still fail under a standard that examines whether a plan whose results are racially dilutive. In other words, a new plan might fail if its adoption would lead to a lawsuit under Section Two. To be sure, the statements from the floor debates are entirely uniform in their endorsement of this incorporation theory, which is at least partially due to the need for compromise in a divided government.[140] Nevertheless, the theory described in these reports indicates that Congress

134. Thomas R. Morris & Neil Bradley, *Virginia*, *in* QUIET REVOLUTION IN THE SOUTH 271 (Chandler Davidson & Bernard Grofman 1994).

135. City of Mobile, Ala. v. Bolden, 465 U.S. 55, 61 (1980).

136. *See* S. REP. NO. 97-417, at 17 (1982).

137. *Id*. at 27–29.

138. H.R. REP. NO. 97-227, at 34–35 (1982); *see also* 128 CONG. REC. 14,312-13 (June 18, 1982).

139. H.R. REP. 97-227, at 33 (1981); S. REP. NO. 97-417 (1981).

140. *See generally*, H.R. REP. 97-227, (1981); S. REP. NO. 97-417 (1981).

might not have simply accepted or endorsed the Court's formulation of the standard in *Beer*.[141]

Whether or not Congress intended to incorporate Section Two analysis into the pre-clearance standard in 1982, the Supreme Court summarily rejected this approach in its later cases. Holding to its *Beer* formulation, the majority has explained that the VRA's provisions embody distinct functions that require different approaches.[142] Where Section Five is concerned, retrogression analysis remains the controlling inquiry.

The Court emphasized this functional distinction in *Holder v. Hall*, where it dismissed a Section Two lawsuit to increase the size of a governing body.[143] Minority voters tried to analogize their claim to the pre-clearance review, which applied to the size of a jurisdiction.[144] The Court rejected this approach because there was no reasoned basis of comparison. Review under Section Two requires comparing the challenged system to an ideal one.[145] But Section Five's standard review only requires an analysis of the current system and the proposed change.[146]

The Court formally discarded the idea of incorporation in the first review of *Reno v. Bossier Parish*.[147] There, the DOJ had objected to a school district plan because of a likely violation of Section Two.[148] The majority first remanded and later upheld the plan, finding that the DOJ had exceeded its power under the pre-clearance provision.[149] Noting the various procedural distinctions in the review process, the Court concluded that the Section Five inquiry was designed to be limited.[150] While relevant to a pre-clearance inquiry, evidence of vote dilution (a concern under Section Two) cannot itself provide the basis for finding a violation under the standard

3. The Racial Gerrymandering Cases

The Court's narrow approach is also evident in its racial gerrymandering cases, which outlaw district drawing that it is predominantly motivated by race.[151] The majority's analysis focused on the 14th Amendment, but these

141. *See generally*, H.R. REP. 97-227, (1981); S. REP. NO. 97-417 (1981).
142. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000).
143. Holder v. Hall, 512 U.S. 874, 885 (1994).
144. *Id*. at 882.
145. *Id.* at 880.
146. *Id*. at 883.
147. *Bossier Parish Sch. Bd*., 528 U.S. at 339–40.
148. *Id*. at 475.
149. *Id.* at 490; *see Bossier Parish Sch. Bd*., 528 U.S. at 339–40.
150. *See Bossier Parish*, 528 U.S. at 329, 335.
151. Miller v. Johnson, 515 U.S. 900, 920 (1995); Shaw v. Reno, 509 U.S. 630, 643–44 (1993).

cases just as strongly rely upon its adherence to the retrogression principle.[152] The states in these cases had drawn multiple black-majority districts partly to avoid a threatened pre-clearance objection.[153] The Court acknowledged that complying with the VRA was a compelling state interest, but such compliance did not require maximizing the number of black-majority districts.[154] Put another way, the DOJ was not allowed to use its pre-clearance power to force states to adopt a specific number of majority-black districts. In *Miller v. Johnson*, for instance, the DOJ had no reason to encourage Georgia to draw more than the two majority black districts in its original plan.[155] The state's earlier plan was not retrogressive, the Court implied, because it featured one more of these districts than the state had in 1980.[156]

The aforementioned cases all applied the retrogression test in cases involving likely alleged discriminatory effects. The Court has also employed retrogression to analyze plans that might violate the pre-clearance standard due to a discriminatory purpose. *Reno v. Bossier Parish School Board* (*Reno II*) upheld a school board plan even though local officials openly refused to draw even one majority-black district to help accommodate its thirty percent black population.[157]

Reasoning from *Beer*, Justice Scalia claimed that applying the principle parallel construction of statutes mandated this outcome.[158] The "purposes" prohibited in the provision had to be identical to the kind of "effects" that were barred—meaning only retrogressive ones.[159] Thus, a jurisdiction's goal of renewing its existing plan—even an unconstitutional one—did not violate the review standard.[160] Although it took great pains to harmonize this interpretation with other prior holdings, the majority did not appeal to the legislative hearings to support its position.[161] As in *Beer*, the jurisdiction's poor history of minority representation immunized its changes from close review.[162] In sharp contrast to the vigorous enforcement scheme suggested by

152. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 983 (1996) (There, the Court made clear that nonretrogression simply required "that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions").

153. *See e.g.*, *Miller*, 515 U.S. at 906-07; *Shaw*, 509 U.S. at 651.

154. *Miller*, 515 U.S. at 910.

155. *Id.*

156. *Id*. at 923.

157. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 323, 326, 341 (2000).

158. *Id.* at 336.

159. *Id*. at 328–29 ("[W]e refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying").

160. *Id.* at 336.

161. Rather, the Court justified its position based on the structural claim that sections 2 and 5 of the Act were analytically distinct and have applications that do not overlap. *Id*. at 342–43 (Souter, J., dissenting).

162. *Id*. at 341–42.

Allen, this holding requires the federal reviewer to overlook violations of Section Two or even the Constitution itself.

4. Retrogression Redux

The campaign to rein in pre-clearance review by judicial interpretation reached new heights in *Georgia v. Ashcroft*, whose holding only purported to define the "effective exercise of the franchise."[163] In fact, the Court relaxed the pre-clearance standard to the point that dissenters in the case wondered whether anything was left of the review standard.[164] Under this latest gloss on retrogression, states can intentionally eliminate existing majority-minority districts without causing a violation. That is, the Court endorsed a change that clearly reduces existing minority voting strength (which seemed exactly what retrogression says is barred).[165]

The district court reviewed the plan in question and denied pre-clearance, primarily because the state had substituted black majorities with "influence" districts.[166] The new districts contained fewer blacks than their predecessors, and they were located in different parts of the state. The panel also pointed out that even if blacks enjoyed an "equal opportunity to elect" candidates overall (as Georgia's evidence arguably showed), the plan was retrogressive because fewer seats were under the control of black voters than was true under the old plan.[167]

The Supreme Court concluded that the trial court had misapplied the retrogression standard.[168] The correct inquiry was whether Georgia had retrogressed in the totality of circumstances.[169] This time, the majority's reasoning rested neither on an analysis of the statutory text nor on Congress' intent but on a political theory.[170] While not the same as controlling elections, political influence can be an important alternative basis of political representation for minority groups.[171] For this reason, a court should not discount or ignore the benefits gained from districts with less than a black

163. 539 U.S. 461, 479 (2003).
164. *Id*. at 495 (Souter, J. dissenting).
165. *Id.*
166. *Id.* at 470, 474.
167. *Id.* at 474.
168. *Id*. at 477.
169. Georgia v. Ashcroft, 539 U.S. at 479–80.
170. *Id.* at 490–91.
171. *Id*. at 482.

majority.[172] In the majority's view, the new plan likely complied with Section Five.[173]

III. DISCUSSION

The preceding sections have made the case that interpreting the pre-clearance remedy has not been uniformly expansive. Contrary to the view of some critics, the evolution of this provision has been more complicated. Whereas some features of the remedy have been construed in an expansive manner, the central part of the remedy—the standard of review—has followed a very different trajectory. The federal judiciary has consistently employed a narrow interpretation of this standard to outlaw only a small subset of discriminatory state practices. Unlike the construction of the first two features, the substantive test for pre-clearance violation has not involved the kind of mutual reinforcement that would entrench a clear meaning. Either due to Congress' purposeful ambiguity or its insufficient action, the courts have remained dominant in shaping the provision, and their view has been decidedly narrow compared to the way the other parts of the remedy have been read.

This section places these observations in context, relying on the interactive theory of statutory construction discussed earlier. At its core, the judiciary's role in shaping the standard of review is explainable by the role that this feature plays in the VRA along with the court's strategic considerations about how Congress might react to its retrogression principle.

The judicial emphasis on controlling the standard of review is not especially surprising given the nature of the provision. The process of assessing a pre-clearance violation closely resembles the kind of adjudication that the judges employ in common law cases. Courts have a comparative advantage over legislatures in developing the kinds of tests applied in a variety of circumstances. Unlike legislatures, the courts are also able to refashion these tests in light of new observations. The expertise in elaborating on an existing standard partly explains the judiciary's more active role in construing this part of the statute.

However, this trend is also explainable by the court's strategic considerations in advancing its construction of the review standard. The key moment in the development of this standard was when the judiciary adopted the retrogression principle in *Beer*.[174] Nothing in the previous legislative enactments of the VRA, either the legislative history or the statutory text,

172. *Id*. at 482–83. The most contested aspect of this holding, though, concerned the opinions of black state legislators who supported this plan. The Court found that their opinions were "relevant"—though not dispositive—evidence favoring approval. *Id*. at 471, 484.

173. *Id*. at 487.

174. Beer v. United States, 425 U.S. 130, 141 (1976).

indicated that Congress anticipated such a narrow construction.[175] But the judiciary found that the interpretive choice was compatible with its own sense of how pre-clearance ought to work in practice. If Congress favored a broader conception for the provision, then they had the authority to enact it.

Ironically, Congress did not remain entirely silent on whether this interpretation of the provision was correct. While it did not address the retrogression issue with new statutory language that rejected the prior interpretation, the legislative record from 1982 supported a broader view of the standard than *Beer* described.[176] Of course, the statements from legislative committee reports were not the same as new statutory text. Thus, this kind of evidence would only be persuasive to a judiciary willing to cede their preferred interpretation to a less robust display of legislative intent. Their reaction was to maintain (and, at times, expand) the retrogression analysis in later cases. Aside from carving out narrow exceptions to the principle in selected cases, the Court employed the retrogression test to deny or limit pre-clearance enforcement in redistricting cases as well as discriminatory intent cases.

Without a contrary view expressed in the form of a statutory override of *Beer*, the judiciary found no basis to depart from its conception of the pre-clearance standard. The Court might be criticized for failing to weigh the 1982 congressional committee findings more seriously in their analysis, but their decision is not without foundation. Congress clearly did adopt new statutory language to override a contrary judicial construction of Section Two of the Act in the renewal,[177] making the absence of similar changes in reaction to *Beer* much more meaningful. By signaling its inability or unwillingness to commit to a particular view of the remedy, the Court had no incentive to alter their approach to the provision. Consequently, the judiciary relied far less on text and the legislative history in analyzing future cases. Instead, the Court spent much more energy on assuring that its decisions would remain compatible with their own view of the standard.

175. *See id.* at 139–41.

176. *See generally*, H.R. REP. No. 97-227 (1981); S. REP. NO. 97-417 (1981).

177. H.R. REP. NO. 97-227, at 2 (1981); *see generally* S. REP. NO. 97-417 (1981).